STATEMENT

of

Roger Pilon, Ph.D., J.D.
Vice President for Legal Affairs
B. Kenneth Simon Chair in Constitutional Studies
Director, Center for Constitutional Studies
Cato Institute

before the

Committee on Government Reform
United States House of Representatives

June 29, 2006

Re: "What Price Free Speech? Whistleblowers and the *Ceballos* Decision"

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies. I thank you, Mr. Chairman, for inviting me to testify today on the Supreme Court's recent decision in the case of *Garcetti v. Ceballos*.[1] Your letter of invitation states that "the purpose of this hearing is to understand [this decision] regarding First Amendment protection for whistleblowers and how—if at all—this decision affects whistleblower protection."

At the suggestion of committee staff, I will direct my remarks to the *Ceballos* decision rather than to the various federal and state whistleblower statutes. In doing so I will do the best I can to understand the decision, but I should say at the outset that it is not the easiest decision to understand—in either its majority or its three dissenting opinions. Part of the reason for that, as the majority says, is that once one gets past a few broad principles, the inquiries have "proved difficult" due to "the enormous variety of fact situations."[2]

Before I turn to the decision, however, it may be useful to state my general conclusions regarding the issues your letter raises. First, after *Ceballos* it appears that the First Amendment may offer only limited protection to whistleblowers, in part because there may be only so much a judge can do under the amendment to adjudicate these complex cases. Accordingly, if the relationship between the government employer and employee is to be fleshed out further—to protect both the needs of government and the

[1] 126 S. Ct. 1951 (2006).
[2] *Id*. 1958.

rights of employees—it will have to be by statute. That is hardly a novel conclusion, I realize, but I offer it as an antidote to the idea that the disputes at issue lend themselves in any far-reaching way to constitutional as opposed to statutory adjudication.

Second, assuming robust federal and state statutory protections for whistleblowers are in place, this decision, based on the First Amendment, should have no affect on those protections. Thus, third, those media reports you reference that appeared immediately after *Ceballos* came down,[3] suggesting that the decision eviscerated federal and state whistleblower protections, were not accurate. Whether those measures are themselves adequate is of course a separate matter, which I understand the next panel will address.

Let me turn now to the decision. I will first summarize the facts, then look at the Court's opinion, then the dissents, at which point I will make a few observations.

Summary of Facts[4]

Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, was asked by a defense attorney to review an affidavit police used for a search warrant. The attorney claimed the affidavit was inaccurate. After investigating the matter, Ceballos agreed. He advised his supervisor, then prepared a disposition memo recommending dismissal of the case. Nonetheless, the prosecution proceeded. At a hearing to challenge the warrant, the defense called Ceballos to testify. The trial judge denied the motion to suppress because he found independent grounds for the warrant. Ceballos claims he was then subjected to a series of retaliatory employment actions. He initiated an employment grievance, which was denied. He then filed a section 1983 claim in U.S. District Court, alleging violations under the First and Fourteenth Amendments.

The District Court granted District Attorney Garcetti's office summary judgment, ruling that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. The Ninth Circuit reversed, holding that the memo's allegations were protected under the First Amendment.

The Majority's Opinion

Writing for himself, the Chief Justice, and Justices Scalia, Thomas, and Alito, Justice Kennedy reversed the Ninth Circuit's decision, holding that "when public employees make statements pursuant to their official duties, the employees are not

[3] See, e.g., Fred Barbash, *Supreme Court Limits Whistleblower Lawsuits*, Wash. Post, May 30, 2006 ("[The *Ceballos*] decision enhances the ability of government at all levels to punish employees for speaking out …."); *All Things Considered* (Nat'l Public Radio broadcast, May 30, 2006) (Melissa Block, host: "Today the Supreme Court made it much more difficult for public employees to bring retaliation claims against their bosses."); id. (Nina Totenberg, reporting: "[The *Ceballos* decision] was a huge loss for the nation's 21 million public employees ….").

[4] Because the case is before the Court on a motion for summary judgment, the facts asserted by the plaintiff are assumed to be true and all inferences are drawn in his favor.

speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[5]

The Court's opinion, at its core, is really quite simple. Following *Pickering v. Board of Education*[6] and cases decided in its wake, "two inquires" guide interpretation.

> The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[7]

And what counts, in this second case, as an adequate justification for the government's "broader discretion" to restrict or sanction the speech of an employee? The government may do so, the Court says, "when it acts in its role as employer" and the speech "has some potential to affect the entity's operations." Indeed, "government offices could not function if every employment decision became a constitutional matter."[8]

At the same time, "so long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[9] Thus, the Court's decisions, Justice Kennedy concludes, "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."[10]

Applying those principles to the case at hand, the Court found that the dispositive factor was not that Ceballos expressed his views inside his office rather than publicly, nor that his memo concerned the subject matter of his employment, but that "his expressions were made pursuant to his duties."[11] "Ceballos did not act as a citizen" but as a government employee, subject to "employer control over what the employer itself has commissioned or created."[12]

Were the Court to adopt the rule proposed by the Ninth Circuit, Justice Kennedy continues, managerial discretion would be replaced by judicial supervision:

---

[5] Ceballos, *supra* note 1, at 1960.
[6] 391 U.S. 563 (1968).
[7] Ceballos, at 1958.
[8] *Id*.
[9] *Id*.
[10] *Id*. at 1959.
[11] *Id*. at 1959-1960.
[12] *Id*. at 1960.

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.[13]

Rejecting the notion "that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties," the Court concludes by pointing to the importance of employee speech for good government and to "the powerful network of legislative enactments … available to those who seek to expose wrongdoing."[14]

The Dissents

Justice Stevens dissented briefy. Justice Souter dissented more extensively, joined by Justices Stevens and Ginsburg. And Justice Breyer dissented.

The main criticism each dissent makes concerns what each sees as the Court's "categorical" distinction between speaking as a citizen and speaking in the course of one's employment. As Justice Stevens says: "The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is 'Sometimes,' not 'Never.'"[15] Citing several prior cases, Justice Souter writes, "the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job…."[16] And Justice Breyer argues that the case at hand "asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job."[17] The majority, he continues, answers "never." "That word, in my view, is too absolute."[18]

That criticism is not without merit. In numerous places, the majority's language is categorical, starting with its statement of its holding: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, …."[19] Again, in applying its holding to the case at hand the majority says that Ceballos "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."[20] And again, the majority concludes

---

[13] *Id*. at 1961.
[14] *Id*. at 1962.
[15] *Id.*
[16] *Id*. at 1964.
[17] *Id*. at 1973.
[18] *Id*. at 1974. "Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely when the government employee both speaks about a matter of public concern and does so in the course of his ordinary duties as a government employee." *Id.*
[19] *Id*. at 1960.
[20] *Id*.

that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail."[21]

At the same time, the majority seems to leave the door open to what might be called "mixed" cases—cases in which the employee is speaking *both* pursuant to his official responsibilities *and* as a citizen on a matter of public concern. Thus, returning to the "two inquiries" with which the Court begins its opinion, if the answer is "yes" as to "whether the employee spoke as a citizen on a matter of public concern," then "the possibility of a First Amendment claim arises."[22] Notwithstanding its categorical language elsewhere in the opinion, the Court here seems to be entertaining a mixed case, for a First Amendment claim might arise where the government does not have an "adequate justification" for its disciplinary action.

But having raised the possibility that the Court did entertain mixed cases, let me offer language by the majority that seems to go the other way:

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker. *When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.*[23]

Does that mean that speaking "pursuant to employment responsibilities" forecloses speaking *in the same breath* as a citizen? As Justice Souter notes, "would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance?"[24] Perhaps the most that can be said on this fundamental but crucial point is that we have not seen the last of this litigation.

Turning to another matter, Justice Souter would adjudicate this and other such cases as follows under a *Pickering* balancing scheme:

> …the extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate

[21] *Id*. at 1961.
[22] *Id*. at 1958.
[23] *Id*. at 1961. (emphasis added)
[24] *Id*. at 1965-1966.

> the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor.[25]

Although that standard does establish a presumption on the side of the government employer, Justice Breyer responds that it not only "fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes," but it also screens out very little, for there are "far too many issues of public concern, even if defined as 'matters of unusual importance.'"[26]

Yet another problem with the Souter standard, however, is that it is an unbridled invitation to the judiciary to make subjective policy and value judgments. In fact, the standard reads rather like something a legislature might use in crafting whistleblower legislation. By contrast, the majority's standard—statements made "pursuant to official duties"—seems more objective. Yet Justice Souter writes that "the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made 'pursuant to official duties.'"[27]

What then are we to make of this? In his special concurrence below, Judge Q'Scannlain began his opinion by noting that "for much of this Nation's history, our courts generally accepted then-Judge Holmes's immoderately narrow view of the First Amendment rights of public employees: '[A constable] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'"[28] The implication of Holmes's observation is that government, as employer, may dictate the terms of employment. Justice Kennedy stated the modern view at the outset of his opinion: "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[29] That seems right. But if the balance to be struck between free speech and government power is sometimes difficult to discern in the case of ordinary citizens, it is far more so in the case of government employees, who invariably wear two hats. And the speech rights of CIA agents are surely far different than those of professors at state universities.

The thrust of the majority in *Ceballos* seems to be to reduce the role of the courts in drawing these difficult lines. It is doubtful that the Court drew the line correctly, but neither does it seem that the dissents got it right. When the constitutional material they have at hand is too sparse, courts tend to make policy judgments, on one hand, or leave things as they are, on the other hand. This is a place for legislation to flesh out the relationship between the needs of the people and the rights of government employees, consistent with the idea that citizens do not give up all of their rights when they enter government service.

---

[25] *Id.* at 1967.
[26] *Id.* at 1975.
[27] *Id.* at 1968.
[28] Ceballos v. Garcetti, 361 F.3d 1168, 1185 (2004) (O'Scannlain, J., concurring) (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (Mass. 1892)).
[29] Ceballos, *supra* note 1, at 1955.